United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2367

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ITT WORLD DIRECTORIES, INC.,

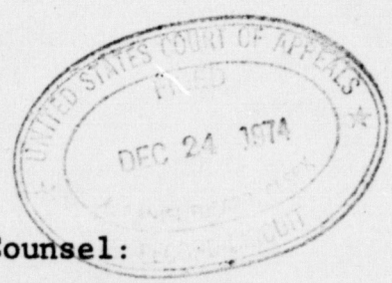
Plaintiff-Appellant,

-against-

CIA. EDITORIAL de LISTAS, S.A. and
EDITORIAL de GUIAS LTB., S.A.,

Defendants-Appellees.

BRIEF FOR PLAINTIFF-APPELLANT



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DOCKET NO. 74-2367

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OPINION BELOW

The decision appealed from was rendered by the Honorable John M. Cannella, United States District Judge for the Southern District of New York, in a Memorandum Decision and Order, dated October 3, 1974 which has not yet been reported, and a judgment thereon.

ISSUES PRESENTED

1. Is a prima facie case for restitution estab-

lished by proof of an amount due and erroneous payment of a larger amount?

2. Did the Trial Court properly allocate the parties' respective burdens of proof in an action, tried largely on a stipulated record, for reimbursement of an overpayment.

STATEMENT OF THE CASE

Nature of Action and Proceedings Below -- This diversity action seeks restitution of a $353,997 overpayment in an acquisition by plaintiff of two Portuguese companies from defendants for an amount in excess of $8 million. Plaintiff claims the overpayment resulted from an erroneous calculation of the amount actually due as a post-closing payment for the net worth of the acquired companies.

The case was tried without a jury in a half-day trial on a largely stipulated record; plaintiff called only one witness and defendants called none. The District Court dismissed the complaint* on the ground that "plaintiff did not present any facts which would establish that the overpayment of $353.997 was a mistake rather than a purposeful decision." (Appendix, p. 145a)** Defendants offered no

*The Court also dismissed a counterclaim in the amount of $50,000. Defendants have not appealed from this dismissal.
**Pages of the Appendix will hereinafter be referred to as "___a").

proof (except by way of the stipulated facts) after plaintiff rested. The court, in ruling for defendants, held that plaintiff had failed to establish a prima facie case.

Facts -- On July 9, 1969, defendant CIA. EDITORIAL de LISTAS, S.A. ("CELSA" or "defendant") agreed to sell plaintiff its wholly-owned corporate subsidiary P.L.T. - Publicacoes de Listas Telefonicas, S.A.R.L. ("PLT") and its 92.1% interest in Bertrand (Iramos) Lta. ("Bertrand"), a Portuguese entity known as a quota company. Defendant EDITORIAL de GUIAS LTB., S.A., guaranteed the obligations of defendant CELSA (Pltf. Ex. 1, ¶¶1, 2, E-1; Pltf. Ex. 2, E-11)* [The following statement will cover only those aspects of this complex transaction as are involved in this lawsuit.]

The purchase price included an amount attributable to the May 31, 1969 "tangible net worth" (as defined in the acquisition agreement) of PLT and Bertrand** as determined, after audit, by a certificate of Arthur Andersen & Co., the independent auditor for the purchaser and seller.***

As a result of its audit, Arthur Andersen con-

*Pages where the exhibits may be found in the separately bound booklet of exhibits will be referred to as "E__".

**This amount was to be equal to the full "tangible net worth" of PLT and 92.1% of the "tangible net worth" of Bertrand.

***Arthur Andersen's determination was to be "final and conclusive" unless CELSA served written objections within 20 days after receiving Arthur Andersen's certificate, in which case an arbitration procedure was provided (Pltf. Ex. 2, ¶3.6, third full para.E-16). CELSA never served any written objections.

cluded that the combined net worth of PLT and Bertrand amounted to 3,062,780 Portuguese escudos (or about $138,224) (61a); Arthur Andersen's opinion was contained in the opening portion of its audit report (Pltf. Ex. 3, E-23, 24), rather than in a separate piece of paper (103a)*. This figure was arrived at by taking the net worth figure set forth by the outgoing management of the companies being audited in the amount of approximately $14,062,780 escudos (or $492,221), and making two deductions therefrom, totalling 11,000,000 escudos (60-61a).

More specifically, the deductions required by Arthur Andersen were (a) a 5,000,000 escudos deduction because of an understatement of Bertrand's reserve for depreciation on machinery (resulting from an inconsistent method of accounting) (62a) and (b) a 6,000,000 escudos deduction because of certain obligations to Bertrand's minority quota holders (65a).

Defendants did not agree with the necessity of making the two deductions required by Arthur Andersen (E.g., 88a) although they did furnish Arthur Andersen with a letter confirming that Bertrand had not followed a consistent depreciation policy, thus causing the company's accumulated depreciation to be understated by an estimated 5,000,000 escudos (Pltf. Ex. 4, E-37). In any event, plaintiff was advised of the Andersen figures

*Defendants have argued that this is a significant distinction; plaintiff believes it is irrelevant.

in September, 1969 (Pltf. Ex. 1, ¶16, E-6). As a result of this advice, plaintiff inquired of its Portuguese counsel as to its obligation to the minority quota holders and was advised that the problem was "involved" and should be negotiated rather than becoming the subject of a lawsuit with the holders (Id, ¶18, E-7-8).

On October 23, 1969, plaintiff's former manager of accounting, John Morrison, prepared a memorandum setting forth calculations to determine, among other things, the combined net worth of PLT and Bertrand "as per purchase agreement." The memorandum stated that the "Net Worth Per A.A. [Arthur Andersen] report was 14,062,780 escudos", or $492,221 (Pltf. Ex. 1, ¶21, E-8). This was, in fact, precisely the net worth figure claimed by defendants' outgoing management and did not take into account either of the deductions required by Arthur Andersen as set forth in its report, to arrive at its $138,224 net worth figure, the amount actually owed by plaintiff.

On October 31, 1969, plaintiff paid defendant the $492,221, together with other sums not involved in this action, in a combined payment of $803,239.

ARGUMENT

I.
THE LEGAL ISSUES CONCERNING ERRONEOUS OVERPAYMENTS ARE CLEARLY POSED BY A LARGELY STIPULATED RECORD

The District Court's Memorandum Decision and

Order consisted of twenty pages. More than half of these pages are devoted to a separate section entitled "The Facts" in which the Court sets forth the stipulated facts (Pltf. Ex. 1, E-1-9) virtually verbatim. These facts presumably represent compliance with the mandate of Rule 52(a) of the Federal Rules of Civil Procedure to "find the facts specially". Plaintiff, having stipulated to these facts, in no way seeks to controvert them or to set any of them aside.

The only evidence offered at the trial over and above the facts stipulated were eleven exhibits, all referred to in the stipulation, and the testimony of Jeremy Jerram, the Arthur Andersen auditor responsible for the Auditor's Report, who testified for the plaintiff. None of this additional evidence was set forth by the District Court in its special findings of fact, but references were made to such evidence in the Court's decision. In any event, there is again nothing in any of this additional evidence which is controverted by the plaintiff.

The foregoing has been set forth in order to focus the issues plaintiff believes are before this Court: the facts in this half-day trial, on a largely stipulated record, are not in dispute; nor are the underlying legal principles cited by the District Court controverted by plaintiff. It is rather the application of these principles by the District

Court that calls for review.

In view of these circumstances, this case, like Orvis v. Higgins, 180 F.2d 537 (2d Cir.), cert. denied, 340 U.S 810 (1950), is one in which "the evidence consists in large part of facts neither side disputes, in circumstances such that the Trial Judge's evaluation of credibility becomes unimportant." 180 F.2d at 540. It is accordingly believed that this case calls for application of the rule articulated in Orvis that this Court "may ignore the Trial Judge's finding and substitute" its own. 180 F.2d at 539.*

The approach of this Court in Orvis has been noted with approval in other circuits. For example, in Surgical Supply Service, Inc. v. Adler, 321 F.2d 536, 539 (3rd Cir. 1963), the court made the following observations which are directly applicable to this case:

> "The findings of fact made by the trial court were based on a comparison of the exhibits, the uncontradicted testimony of a single witness, and the inferences drawn from the evidence. It has been uniformly held by this Court, and others, that under these circumstances, the findings of fact are reviewable on appeal free from the impact of said rule. [the "clearly erroneous" standard in FRCP 52(a)]"

*The points of similarity between this case and Orvis are many; here, as there, the Trial Judge relied not on testimony but "negative testimony," i.e., the absence of testimony in this case as to the details of how plaintiff made its error in calculating the payment due.

Similarly, broad appellate review has been followed in the Fifth Circuit "when the factual determination is primarily a matter of drawing inferences from undisputed facts or determining their legal implications..." Mayo v. Pioneer Bank & Trust Co., 297 F.2d 392, 395 (5th Cir. 1962). Accord: Sears, Roebuck & Co. v. Johnson, 219 F.2d 590, 591 (3rd Cir. 1955). (Where dispute is not as to basic facts but as to inferences, appellate court "can determine, as advantageously as the district court can, whether or not an inference...is warranted").

The vitality of Orvis was recognized by this Court as recently as July, 1974. See Fur Information and Fashion Council, Inc. v. E.F. Timme & Son, Inc., 501 F.2d 1048, (2d Cir. 1974); cert. denied, 43 U.S.L. Week 3295. (November 19, 1974). Accordingly, it is believed that this Court is "in as good a position as the trial court to examine and evaluate the evidence and make the necessary determinations" itself. See Nasco Incorporated v. Vision-Wrap, Inc., 352 F.2d 905, 908 (7th Cir. 1965). It is submitted that such determinations here, guided by the legal principles discussed below, require reversal.

II.
AN ERRONEOUS OVERPAYMENT IS RECOVERABLE IN AN ACTION FOR RESTITUTION

The Court below properly found that this diversity

action is governed by the law of New York and that the law of New York on recovery of money paid under a mistake of fact is aptly summarized in the Restatement of Restitution, §20 (1937). (144-45a):

> "Section 20. The person who has paid another an excessive amount of money because of an erroneous belief induced by a mistake of fact that the sum paid was necessary for the discharge of a duty for the performance of a condition, or for the acceptance of an offer, is entitled to restitution of the excess."

This proposition has long been established by the New York cases.

Byxbie v. Wood, 24 N.Y. 607, 610 (1862).

Leslie v. Wiley, 47 N.Y. 648, 651 (1872).

Hathaway v. County of Delaware, 185 N.Y. 368, 78 N.E. 153 (1906).

Ball v. Shepard, 202 N.Y. 247, 253, 95 N.E. 719 (1911).

Village of Elmira Heights v. Town of Horseheads, 234 App. Div. 270, 254 N.Y.S. 418, 422 (2d Dept. 1931).

Indeed, it has recently been noted that the rules of law permitting recovery of money paid by mistake have been "gradually growing more liberal." 50 N.Y. Jur., Restitution-Mistake, §22, p. 209, annotation.

Because the basis of this appeal is the misapplication of these principles, (discussed in III, supra) it may be helpful to furnish this Court, in more detail

than set forth in the opinion below, examples of their proper application under New York law. Such discussion will illustrate judicial treatment of mistakes in the context of restitution actions.

In Mutual Life Insurance Company of New York v. Kessler, 25 Misc.2d 242, 202 N.Y.S.2d 92 (Supt. Ct. N.Y. Co. 1960), an insurer neglected to deduct an outstanding loan from the proceeds of an insurance policy. This error was committed by four of plaintiff's employees. As a result, the beneficiary received the gross amount of the policy without a deduction for the loan. In awarding recovery of the overpayment, the Court stated that:

> "Both parties agree on the well-settled equitable proposition that a party should not be unjustly enriched and that money paid because of mistake of fact may be recovered back, even though the party making the mistake may have been negligent. [citation omitted]. This is true unless the payee, has, in reliance on the payment, changed his position to his detriment. The burden of proving such a detrimental change is, of course, on the payee." 202 N.Y.S.2d at 94.

Defendants in the present case made no attempt to shoulder their burden of coming forward to demonstrate any change of position. In this respect, they are in a position similar to that of defendant in Manufacturers Trust Co. v. Diamond, 17 Misc.2d 909, 186 N.Y.S.2d 917 (App. T. 1st Dept. 1959) where recovery was awarded to a bank which mistakenly paid a check drawn on a closed account. The

majority per curiam opinion of Justices Hofstadter and Steuer opened with the following:

> "The defendant rested on the plaintiff's case and there is no proof whatever that the defendant was prejudiced by or changed [its] position in any way in reliance on the plaintiff's conduct. It is self-evident that but for a mistake the plaintiff would not have paid the check for $500 drawn on an account which had already been closed." (Emphasis added) 186 N.Y.S.2d at 918.

This same approach had been followed more than 75 years earlier in Mayer v. The Mayor, etc. of the City of New York, 63 N.Y. 455 (1875) where plaintiff secured repayment of a tax assessment which he had paid on a lot he did not own. The court there stated that "if circumstances exist which take the case out of the general rule [that 'money paid under a mistake of a material fact may be recovered back'] the burden of proving them rests upon the party resisting the repayment." 63 N.Y. at 457.

The case law is not limited to recovery for mistakes by inadvertent landowners and the like. It also clearly covers mistakes of carelessness and forgetfulness made by sophisticated business organizations who were nevertheless held entitled to recovery, including: (a) insurance companies, e.g., Mutual Life Insurance Co. v. Kessler, supra; (b) banks, e.g., The Kingston Bank v. Eltinge, 40 N.Y. 391 (1869); and (c) stockbrokers, e.g. Hoyt v. Wright, 237 App. Div. 124, 261 N.Y.S. 131 (1st

Dept. 1932); Greene & Ladd v. Bernstein, 39 Misc.2d 1062, 242 N.Y.S.2d 367 (Civ. Ct. 1963).*

It is self-evident that defendants here have refrained from attempting to offer proof because the equities simply do not lie in their favor; there is no justification for their retaining a windfall as a result of plaintiff's mistake. Moreover, they could not show a change of position because the funds in controversy were attached by plaintiff and are still subject to the order of this Court. Cf. Greene & Ladd v. Bernstein, supra.

Defendants here have consistently taken the

*The situation involving an overpayment in an acquisition based on a mistake in calculating the performance of the acquired business has had precedents going back to earlier eras. Thus, the court in The Kingston Bank case, supra, cited an old English case, Townsend v. Crowdy, 8 Com. B. [N.S.] 476, 492 where:

> "A had agreed with B to purchase his share of a partnership business, for a given sum, subject to diminution, if a moiety of the profits for three years should be less than a certain amount. Having made a partial investigation of the amounts, and believing that the profits had reached the amount named, A paid the sum in full. Six months afterwards, a more accurate estimate having been made, it was discovered that the profits were considerably less than the estimated amount. Held, that payment having been made under mistake of fact, A was entitled to recover back from B the sum paid in excess." The Kingston Bank v. Eltinge, supra, 40 N.Y. at 397.

position that there was no mistake but that the overpayment was made pursuant to an oral modification of the printed acquisition agreement, i.e., a "substituted agreement". They thus "went to trial not admitting a mistake but insisting that there was none." See Sharkey v. Mansfield, 90 N.Y. 227 (1882) (Recovery awarded for mistake discovered six years after original bill upon which payments made). As discussed below, defendants offered no proof of such a substituted agreement.

III
THE DISTRICT COURT IMPROPERLY ALLOCATED THE BURDENS OF PROOF IN THIS ACTION FOR REIMBURSEMENT OF AN ERRONEOUS OVERPAYMENT

The District Court properly adopted plaintiff's view of the law which mandates recovery for an erroneous overpayment even though negligently made. The court thereafter misapplied the governing principles and incorrectly determined that plaintiff had failed to establish a prima facie case.

As noted above, defendant rested after plaintiff's case, and aside from the stipulated facts, offered no proof. It is plaintiff's position that it proved its prima facie case and defendant failed to prove its affirmative defenses. The Court's decision for defendant is based on erroneously ascribing to plaintiff the burden of disproving the defendant's unproven affirmative defenses.

Accordingly, the key question raised on this appeal is whether or not the District Court properly allocated the respective burdens of proof between plaintiff and defendant.

Plaintiff acknowledges that it has the burden to show that the overpayment was made by mistake of fact. We submit that plaintiff's prima facie case is established by

the following uncontroverted facts:

(1) The acquisition agreement provided for the amount of the payment in question to be based on net worth determined by the opinion of the independent auditors for both plaintiff and defendants, Arthur Andersen & Co. (Pltf. Ex. 2, E-16);

(2) In the opinion of Arthur Andersen, the proper figure was approximately 3 million escudos (Pltf. Ex. 3, E-23-24; 61a);

(3) On October 23, 1969, the former manager of accounting for plaintiff prepared a memorandum setting forth calculations to determine, inter alia, the combined net worth of PLT and Bertrand "as per purchase agreement." Morrison's memorandum stated that the "Net Worth Per A.A. Report was 14,062,780 escudos" (Pltf. Ex. 1, ¶21, E-8).

(4) Plaintiff paid on the basis of the 14 million escudos figure (ID at ¶23, E-9)

Plaintiff sustained its burden of establishing its prima facie case by establishing the amount it paid (14,062,780 escudos - $492,221) and the amount it should have paid (3,062,780 escudos - $138,224), making an over-

payment of $353,997. It has, thus, proven "both sides of the account". See Wisner v. Consolidated Fruit Jar Co., 25 App. Div. 362, 49 N.Y.S. 500 (4th Dept. 1898).

At the very least, the above evidence sufficiently established that plaintiff made a mistaken overpayment, which was enough to shift to defendant the burden of coming forward with evidence to show either that no mistake was made, or that it would be inequitable for plaintiff to recover the mistaken overpayment. Cf. Manufacturer's Trust Co. v. Diamond, supra.

In his decision, Judge Cannella neglected to refer to a recent New York case, cited in plaintiff's Post Trial Memorandum, Valley Bank of Nevada v. Bank of Commerce, 343 N.Y.S.2d 191 (Civ. Ct., N.Y. 1973), rev'd on other grounds, N.Y.L.J. October 30, 1973, p.2, Col. 1-2. On cross-motions for summary judgment, the court analyzed the proper quantum of proof in mistake cases. There, plaintiff, a Las Vegas collecting bank, paid defendant Commerce, the drawee bank, on a forged check and sought reimbursement from the defendant Defendant argued that when plaintiff paid, it was knowingly surrendering or waiving its rights or merely settling a disputed claim.* The Court found at p. 193 and 194:

> "[2] It is surely improbable that [plaintiff] Las Vegas, although aware that it

*The same defenses asserted by defendants here were completely unproven. See pp. 18-19, infra.

had no legal obligation to [defendant] Commerce, graciously agreed to make a $4,000.00 gift to that institution....Accordingly, the further defense of waiver, with the necessary premise that Las Vegas knowingly surrendered its rights, is entirely inapplicable.

"Nor does there seem any substance to the further argument that Las Vegas was merely settling a disputed claim and should be bound by its settlement. It is rare that disputed claims are settled by the prompt payment of the precise amount demanded, particularly when the paying party is a commercial institution that is under no obligation to pay anything.

"Unquestionably, as contended by Las Vegas, its action of Aug. 22, 1969 returning the money to Commerce was a mistake. What is not clear from the papers is the precise nature of the mistake...."

* * *

"As a result [defendant] Commerce received a windfall which in fairness it should not be permitted to retain, and which the law does not permit it to retain.

The Appellate Term reversed solely because mistake had not been pleaded and granted plaintiff leave to renew the motion after repleading. Plaintiff repleaded and amended the complaint to include a cause of action for mistaken payment and the defendant added affirmative defenses. The plaintiff again moved for summary judgment. The Trial Court found: "No new material facts have been introduced by either side which were not in the original motion" and granted plaintiff summary judgment. N.Y.L.J. May 7, 1974, p. 20, Col. 5. Defendant again appealed to

the Appellate Term which unanimously affirmed. N.Y.L.J. October 17, 1974, p. 17, Col. 3 Cf. Barrett v. Lazzara, 2 A.D.2d 982, 163 N.Y.S.2d 420 (4th Dept. 1957).

The amount of the mistaken payment in Valley Bank was $4,000; the amount of the mistaken overpayment here is $353,997. There was no triable issue that plaintiff made a $4,000 gift in Valley; it is beyond any possibility that plaintiff here made a $353,997 gift.

As the Court found in Valley Bank, it is incredible that "disputed claims are settled by the prompt payment of the precise amount demanded, particularly when the paying party is a commercial institution that is under no obligation to pay anything". More so, when the amount is $353,997. And there is simply no proof here of any statement, act or writing showing that plaintiff's payment was the result of a "settlement"; it is an impermissible inference that plaintiff (rather than making a mistake by the overpayment of $353,997) made a casual, spontaneous, conscious decision to agree orally to forget about $353,997 -- a matter for defendants to prove.

Instead of relying on proof by defendants, the District Court speaks of "possibilities", e.g., the possibility that plaintiff's overpayment was the result of a conscious decision rather than a mistake of oversight (E.g., 147a) or "the possibility that the overpayment

was actually a negotiated settlement". These possibilities become completely incredible in the context of this $8,000,000 acquisition transaction which was minutely documented at every stage.

Defendants have consistently based their defense on just such a casual undocumented decision by plaintiff. This begins with the allegation in their Answer that "plaintiff paid to defendant CELSA the sum of $803,239 pursuant to a substituted agreement between the parties" (Answer para. 7, 11a) and extends right up to defendants' counsel's opening statement at the trial. The question raised by this appeal is whether the court was correct in imposing on plaintiff (beyond the burden of establishing an overpayment by mistake) the burden of disproving the negative inference that there may possibly have been a negotiated settlement of the dispute. Such a possible "negotiated settlement" suggested by Judge Cannella in reality refers to the affirmative defense of "substituted agreement" mentioned above* and its variations in the Answer (waiver, accord and satis-

*In addition to the fact that defendant has the burden of proof with respect to the mythical oral "substituted agreement", it should be pointed out that such an agreement could not be proven in the face of the Statute of Frauds (See Reply Fifth, 17a). Moreover, once it is remembered that defendant had the burden of proving its affirmative defenses - the inference contrary to defendant's contention must be made where defendants fail to call any witnesses to testify thereto.

faction, etc.). As to all of these affirmative defenses, defendant has the burden of proof. The effect of the Court's decision is to ignore this basic rule regarding the burden of proving affirmative defenses so as to shift the burden from the defendant, who alleges it, to the plaintiff. This is the essential error made by the court.

In re Sabre Shipping Corporation, 299 F.Supp. 97 (S.D.N.Y. 1969) involved an appeal to the District Court from a referee's Decision in a Chapter 11 proceeding. The debtor resisted return of an overpayment made through a mistake on the ground that the claimant had not shown that overpayment was a mistake of fact, rather than a mistake of law, for which no restitution would be ordered. No evidence was adduced to support this contention and Judge Mansfield held (299 F.Supp. at 101):-

> "This contention states an affirmative defense as to which no proof was brought forward by debtor and must be dismissed.

Defendantshere rested after plaintiff's case; they offered no proof of any of their affirmative defenses (including the "substituted agreement" contention). These defenses must all be dismissed. The unwarranted effect of the Court's decision is to give validity to defendants' completely unproven affirmative defenses.

Plaintiff has claimed and admits that a mistake was made within plaintiff's organization in making this overpayment. Frankly, plaintiff can offer no explanation for the obvious misreading of the Arthur Andersen Report which resulted in the overpayment as described in paragraphs 21 and 23 of the Stipulation of Facts -- other than that a mistake was made. As plaintiff can offer no explanation of exactly how the mistake occurred, it did not try. But that a mistake did occur is clear, and the law provides the remedy of restitution to rectify such mistake.

This is clearly illustrated by Gulf Oil Corp. v. Lone Star Producing Co., 322 F.2d 28 (5th Cir. 1963). In Gulf the facts were as follows: The agreed price for a purchase of crude oil was (a) a price per barrel equal to a particular "posted" price; (b) less any transportation costs in excess of five cents per barrel as stipulated in a particular tariff. The applicable posted price referred to in (a) was $3.15 per barrel. Moreover, the transportation charge in the tariff referred to in (b) was found to be 15 cents per barrel. Accordingly, a 10 cent deduction from the $3.15 was called for but was in fact never made, plaintiff thereby paying the full $3.15.

Approximately two and a half years after the commencement of such payments, plaintiff wrote defendants noting

that this deduction "was inadvertently overlooked", apologizing therefor and requesting reimbursement. Defendant refused. The only pertinent testimony in addition to plaintiff's claim letter stated simply that plaintiff had made an error or overpayment, without furnishing any details or explanation. The District Court took the position that plaintiff had not met its burden of proof because "no one from Gulf Oil's accounting department, the department responsible for the overpayment was called to testify as to the reason for the mistake."

The Court of Appeals reversed because, "there was simply no explanation for the overpayments except that they were made by mistake of fact." Recognizing that the burden of showing a mistake in the first instance was on plaintiff the Court found "under the circumstances of this case, however, that was not a very heavy burden."

The Gulf case was also tried by the court without a jury. The Court of Appeals for the Fifth Circuit there found that the overpayment could be recovered unless it was truly voluntary, that is "done by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will (citations omitted)." There must appear "an intention on the part of the payor to waive his rights." There is no such evidence here. On the contrary, the payment by the plaintiff to defendant, acting

through Mr. Morrison, was intended to be made "as per purchase agreement" for the "net worth per A.A. report", (Stipulation of Facts, Pltf. Ex. 1, ¶21, E-8). Such payment was not made with the intention of waiving any rights of plaintiff. Obviously, Mr. Morrison intended to pay what plaintiff was required to pay - just as the payor did in Gulf.* Therefore, as in Gulf, there is no evidence in this record except that the overpayment was made by plaintiff's mistake.

CONCLUSION

For all of the foregoing reasons, the judgment of the District Court should be reversed and judgment rendered in favor of the plaintiff.

Respectfully submitted,

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*The rationale of the Gulf decision cannot be distinguished by the fact that in that case there was a letter from the payor asserting that the overpayment was the result of "our improper accounting" or by the testimony of an employee to the effect that the payment "was a definite error". Such self-serving statements do not add any more proof of the fact that payment was made by mistake than plaintiff has established in this record.

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[illegible]OWER, WOOD, FULLER,
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